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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1422

WELTRONIC COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 155, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA—UAW,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WO. 2-8745—WO. 2-8732

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Weltronic Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 16, 1969.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, infra, pp. 19-25) is not yet officially reported. The Board's decision and order (Appendix B, infra, pp. 25-41) are reported at 173 NLRB No. 40.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1969. A timely petition for rehearing en banc was denied on January 22, 1970, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Act requires an employer to bargain with a union regarding the preservation of unit work where expansion of an employer's operations resulted in increased employment for bargaining unit employees, there was no adverse effect on such employees, and the contract covered and decided the issues.

2. Whether the National Labor Relations Board has jurisdiction to intervene in and decide a dispute between an employer and a union limited to alleged breaches of a collective bargaining agreement, concerning the meaning and interpretation thereof.

3. Whether an employer's resistance to a union demand that a breach of contract dispute be submitted to arbitra-

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tion, where the contract provides that the matter is not covered by the grievance procedure, specifying arbitration under limited circumstances, constitutes a refusal to bargain.

STATUTORY PROVISIONS

The relevant provisions of the National Labor Relations Act (61 Stat. 140-141, 142, 29 U.S.C. 158(a) (1) and (5) and 8(d) are set forth in Appendix C, infra, p. 42.

STATEMENT OF THE CASE

Petitioner Weltronic Company is a manufacturer of welding controls engaged in interstate commerce, which is the basis for jurisdiction of the National Labor Relations Board. The Company's office and principal place of business is referred to in this proceeding as the Eight Mile Plant. Starting in 1960, Weltronic developed an additional product known as plant central equipment, some of which was produced at the Eight Mile Plant from 1965 to 1967. Plant central equipment was also produced at five or more other locations operated by Weltronic, its subsidiaries or affiliated companies, and independent concerns. (49a, 50a, 61a, 94a)[1].

In the latter part of 1966, Weltronic's business was expanding and it needed more space (58a). A small area at the Eight Mile Plant which had been used for the dual purpose of the manufacture of some welding controls and plant central equipment could no longer be used for any

[1] Figures before "a" herein refer to pages in the Joint Appendix filed with this petition.

plant central manufacture because the manufacturing area was required for the production of welding controls (47a-48a, 50a-52a, 57a-58a, 64a). In addition, the Company had developed a very different type of computer plant central equipment. The Company required a single location with adequate space for the management, sales, engineering and production personnel, particularly because of the complexities introduced by the new product requiring very close supervision of production (63a-66a, 82a).

In April, 1967, Weltronic, for business and economic reasons, established a plant, known as the Telegraph Plant, to produce the new equipment. The Telegraph Plant had five or six times more production space than was used for the portion of plant central wiring and assembly previously done at the Eight Mile Plant (50a-51a, 58a).

The two employees who had worked on wiring and as-assembling the portion of plant central equipment manufactured at the Eight Mile Plant also worked on the manufacture of welding controls. Following the establishment of the Telegraph Plant, they continued doing wiring and assembly work at the Eight Mile Plant (7a-8a, 29a, 95a-96a).

Employees had been on layoff status for about six months prior to the change in operations, but none of them had worked on plant central equipment. At the time of the change in operations, employment at the Eight Mile Plant increased by three of the laid off employees who were called back (the same number of production employees employed at the Telegraph Plant) (120a, 121a). While only part of the sheet metal work for plant central equipment had been done at the Eight Mile Plant, the changes resulted in all of the expanded sheet metal work for the new equipment being done at the Eight Mile Plant (50a, 61a, 73a).

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The Company gave verbal notice of the changes to the employees who had been working on plant central equipment, and to the shop committee representing the Union. The Court below noted that the Company did not give written notice (p. 20).

A dispute arose between the Company and the Union concerning the interpretation of the bargaining agreement. The agreement, limited in its application to the Eight Mile Plant, contained a provision that:

> "In the event the Company discontinues its operations at the present site and moves to another location in the Detroit Metropolitan Area, seniority employees who can and are willing to accept work at the new location will be transferred to a new location with all their seniority, prevailing rates of pay, and prevailing contract with AFL-CIO-UAW and Local 155." (Article I, Section 1(b)) (110a).[2]

In addition, the contract also contained management rights provisions, which included the rights to establish new jobs and discontinue jobs, to determine the type of products to be manufactured, the location of plants, plan scheduling of production, methods, processes, and means of manufacturing (110a-111a).

Breach of contract claims were made by the Union: that the contract required the Company to transfer Eight Mile Plant employees to, and apply the contract to, the Telegraph Plant. The May 5, 1967, "grievance" filed by the Union said:

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[2] The lower court's opinion quotes the foregoing (p. 21), but omits other relevant provisions: the limitation of the contract to the Eight Mile Plant (110a), the grievance procedure (111a-112a), and the provision for plant-wide rather than Company-wide seniority (112a).

> "The Company has violated Article I, Section 1b of present agreement by refusing to transfer the seniority employees with this work, Article I, Section 2, by refusing to negotiate the moving of this work. They have also violated Article 4 by refusing to recall laid off Seniority Employees.",

and demanded "the transfer of seniority employees and the recall of laid off employees to fill the vacancies with back pay for all the employees involved." (116a).

The Board held that the Company's position expressed by letter of May 9, 1967, that the Company had not breached its contract, would not recognize such grievance as proper under the grievance procedure, and would not arbitrate the dispute (115a, 117a), constituted refusal "to meet on this grievance or to discuss the matter further." (97a)[2]

Under the grievance procedure (111a-112a) "An aggrieved employee" can take up his grievance with his committeeman and/or his foreman. Provided the contract steps are followed, which they were not, arbitration of the grievance may result. That the Company's action constituted resistance to the Union's demand for arbitration rather than any refusal to bargain is clear from the Union's final letter of May 23, 1967:

> "As you may well know, we have a grievance that was filed by your shop committee dated May 5, 1967, which is not yet settled.

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[2] Neither the Board nor the court below mentioned that the Union failed and refused to consider its demands to be a bargaining subject, the Union's election to limit the scope of the controversy to alleged breaches of contract, and the Union's intransigent position that the alleged breaches be submitted to arbitration. The facts that the Company did meet with, correspond with, and bargain again with the Union on the substance of the dispute are referred to in the lower court's opinion as a contention that the Company did attempt to bargain with the Union.

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> We are requesting at this time that you set up a meeting to dicuss this grievance in the next step of the Grievance Procedure" (118a).

The Company's reply reiterated its position as to the alleged breaches of contract, and that the contract did not provide for arbitrating the dispute (119a, 117a, 115a).

The Company first learned of the Union's change of position regarding its claims of breach of contract and demand for arbitration when the Board informed the Company that the Union had filed an unfair labor practice charge, containing the misstatement that the Company's changes in operations had resulted in the layoff of employees.

The substance of the dispute was the Union's interpretation of the contract (110a) (Article I, Section 1.(b), *supra*) to apply to the discontinuance of any operation. A few months after the above events, the Union requested, in connection with negotiations for a new contract, that the provision be changed to cover the discontinuance of "any operation" at the Eight Mile Plant. The Company would not agree, and the new contract continued the same "its operations" provision. At the time that general counsel for the Board was preparing his complaint, claiming that the Company had refused to bargain, and should be required to bargain, the parties were bargaining about the same matter.

The lower court has ordered the enforcement of a Board order that the Company be required to bargain concerning the type of products to be manufactured, the location of plants, and scheduling of production, methods, processes and means of manufacturing, regardless of the contract providing that the Company shall have the right to determine such matters. The decision enforces the Board's

order to the effect that the Company must bargain about granting seniority and transfer rights which the contract provides employees do not have, to pay back wages to unspecified employees allegedly injured, to post notices, and to apply contract provisions to a plant to which the contract is inapplicable.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE LOWER COURT CONFLICTS WITH DECISIONS OF THIS COURT AND OF THE COURTS OF APPEALS AS TO THE EXTENT OF THE DUTY TO BARGAIN UNDER 29 U.S.C. 158(a)(5).

The lower court decision holds that the "preservation of work" is one of the "other terms and conditions of employment" about which bargaining is mandatory under Section 8(a)(5) of the Act (p. 23). The questions decided are important and recurring ones in the administration of the federal labor laws. The answers given by the court below appear to be in conflict with applicable decisions of this Court, and of the courts of appeals, and erroneous. In the circumstances, review by this Court is warranted.

The opinion below (p. 23) is based upon two decisions of this Court, *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612 (1967) and *Fibreboard Paper Products Corporation v. NLRB*, 379 U.S. 203 (1964).

The issue in the *National Woodwork Manufacturers* Case was the legality of a voluntary preservation of work agreement in view of the provision of the National Labor Relations Act making it an unfair labor practice for an employer to agree to refrain from handling the products of

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another employer. The decision is not authority for the proposition that preservation of work is a mandatory bargaining subject. Weltronic and the Union had entered into a voluntary work preservation agreement concerning new plants and operations. The agreement was not as broad as the Union would have liked, but employees received substantial rights they would not otherwise have.

The lower court decision conflicts with the *Fibreboard* decision, which was limited to the unusual facts before this Court: the discharge of all (73) persons in the bargaining unit and the substitution of employees of an independent contractor to do the same work in the same plant. The Court said (379 U.S. at page 218): "Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy."

If any obligation existed to negotiate with the Union concerning the breaches of contract alleged by the Union, the Company did much more than was required. The Court stated in *Fibreboard:* "the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of its position", page 214. This rule is particularly applicable to disputes regarding the meaning of unambiguous contract provisions, seeming to call for little more than across-the-table conversation. The lower court appears not only to have disregarded the rule, its decision raises a serious question of the meaning of Section 8(d): that the Act does not compel either party to agree to a proposal or require the making of a concession.

Mr. Justice Stewart, in his concurring opinion in *Fibreboard*, said (at page 218) "The Court most assuredly does not decide that every managerial decision which necessarily

terminates an individual's employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty."

Said opinion goes on to note that (220) the Act defines a limited category of issues subject to compulsory bargaining, and (223) that there are excluded areas where decisions by management may quite clearly imperil job security, or terminate employment entirely. For example, an enterprise may decide to invest in labor-saving machinery, or to liquidate its assets and go out of business. Under the lower court's decision, such enterprise must bargain with the Union. There is insignificant difference between holding that the preservation of work is a mandatory subject of bargaining and that an employer must bargain on any matter of legitimate interest to a union.

Mr. Justice Stewart said in *Fibreboard* that extremely indirect and uncertain impact of management decisions upon job security " . . alone may be sufficient reason to conclude that such decisions are not 'with respect to . . . conditions of employment' ", and that "those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly on employment security should be excluded from that area." (223).

If the lower court is correct, an employer must bargain concerning a decision to curtail or increase production, to discontinue or change a particular product, to substitute a new product, or to increase production of one product at the expense of another, based upon a union's claim of an impact on wages, hours or terms or conditions of employment. It could apply to a decision to turn down an order or refrain from bidding on a job.

The *Fibreboard* decision did not overrule the case law on this subject,[4] but stated an exception based on the facts of that case. For the *Fibreboard* decision to apply there must be an immediate adverse effect upon bargaining unit employees. In our case the changes resulted in increased employment for unit employees.

One of the cases with which the decision below conflicts is *Puerto Rico Telephone Co. v. NLRB,* 359 F. 2d 983 (C.A. 1st Cir. 1966). The employer gave the union no notice of any kind or opportunity to bargain. The court held that there is no duty to give notice or bargain unless an "immediate adverse effect" upon the bargaining unit is established (987), pointing out that in *Fibreboard* such effect was established.

Although the lower court's decision, page 24, states that the question of adverse effect is one to be determined by the Board under the compliance section of the Act, the decisions hold that such finding is a condition of the existence of an unfair labor practice.

The Second Circuit held in *NLRB v. Rapid Bindery, Inc.,* 293 F.2d 170 (1961), that notice to the Union and bargaining is required only where conditions of employment would be "radically changed". In that case, there was

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[4] As a general principle unfair labor practice charges are sustained if the employment of independent contractors was motivated primarily by a desire to prevent or check unionization or to interfere in some manner with union activity. If the motivation for use of independent contractors stems primarily from economic considerations, the employer's action is lawful and does not constitute an unfair practice. See the decisions noted in *Fibreboard,* page 222 (note 7), and the cases in 6 ALR 3rd 1151 et seq.

a complete shutdown and discharge of all production employees.[5]

A similar conflict is with such decisions as that of the Second Circuit in *NLRB v. Spun-Jee Corp.*, 385 F.2d 379 (1967), where after the union knew of a plant move it failed to request bargaining, but stated that it would stand on the association contract. The court held that the union's failure to request bargaining about the cessation of operations, removal, partial shutdown, subcontracting, effects of discontinuance and the transfer of employees constituted a waiver of any rights the union may have had. It follows that in the instant case, the Union's choice of limiting the scope of the controversy to alleged breaches of contract, and insisting on handling the same only under the grievance procedure, and on arbitration, should have had a like result. In accord with *Spun-Jee* is the Fourth Circuit decision in *NLRB v. Cone Mills Corp.*, 373 F.2d 595 (1967), where the union had erroneously insisted on processing a grievance only on the basis of contract superseniority.

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[5] Other examples of conflicting decisions are *NLRB v. Adkins Transfer Co.*, 226 F.2d 324, (C. A. 6th Cir., 1955); *NLRB v. Dale Industries, Inc.*, 355 F.2d 851 (C. A. 6th Cir. 1966); *NLRB v. Adams Dairy Co.*, 350 F.2d 108 (C. A. 8th Cir. 1965); *NLRB v. William J. Burns International Detective Agency, Inc.*, 346 F.2d 897 (C. A. 8th Cir. 1965), and *NLRB v. Kelly & Picerne, Inc.*, 298 F.2d 895 (C. A. 1st Cir. (1962). In a 1969 decision by the Sixth Circuit, *NLRB v. Dixie-Ohio Express Co.*, 409 F.2d 10, changes in an employer's operations resulted in the lay off of 15 of 44 employees. The Court held that the changes could not be characterized as involving wages, hours and other terms and conditions of employment, and no bargaining was required.

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2. THE DECISION OF THE COURT BELOW CONFLICTS WITH DECISIONS OF THIS COURT, AND OF THE COURTS OF APPEALS, LIMITING THE JURISDICTION OF THE BOARD TO ADJUDICATION OF STATUTORY RIGHTS, EXCLUDING JURISDICTION TO ADJUDICATE CONTRACT DISPUTES.

In answer to the Company's contention that the Board lacked jurisdiction to decide a controversy limited by the Union to alleged breaches of contract, and whether the contract required arbitration of the dispute, the lower court cites *NLRB v. C & C Plywood Corp.*, 358 U.S. 421 (1967), as holding that the Board has "the right to determine by reference to the agreement whether one of the parties has agreed to relinquish a statutory safeguard." (p. 23).

In the *C & C Plywood* Case, the Union made no breach of contract claim. When the employer refused to rescind a premium pay plan it had unilaterally established pending bargaining, the Union sought to enforce a claimed statutory right which was a prima facie violation of Section 8(a)(3). This Court said, at pages 424-425, that "Giving consideration to the history of negotiations between the parties, as well as the express provisions of the collective agreement, the Board[6] ruled the union had not ceded power to the employer to change the wage system it had. For while the agreement specified hourly pay for different members of the glue spreader crews and allowed for merit increases for 'particular employee(s)', the employer had placed all the members of these crews on the same wage scale and had made it a function of the production output of the crew as a whole."

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[6] In *C & C Plywood* a substantial part of the Board's decision was devoted to a construction of the contract, relevant provisions thereof, the contentions of the parties, and the history of negotiations between them.

The Court said that the question remained . . "whether the Board was wrong in concluding that the contested provision in the collective agreement gave the respondent no unilateral right to institute its premium pay plan.", and concluded that, since the disputed contract provision referred to increases for "particular employee(s)", not groups of workers, and there was nothing in it to suggest that the carefully worked out wage differentials for various members of the glue spreader crew could be invalidated by the respondent's decision to pay all members of the crew the same wage, the Board had not erred (430).

If a duty to bargain existed, the contract changes rights employees and the Union might otherwise have in many respects. For example, although the Company did not discontinue any jobs, the contract gives the Company the right to establish new jobs and discontinue jobs (111a). To fail to recognize and discuss the contract rights, as the Board and the court below did, amounts to an adjudication of such contract rights in the proceedings as though they had been decided against the Company. As a practical matter, the court below decided that the Union's erroneous interpretation of the contract to grant transfer, seniority, wage, and all other contract rights upon the discontinuance of any operation was correct, that the contract contained no provision limiting it to the Eight Mile Plant (which was the case prior to the then current contract), that the contract provided for Company-wide seniority, and that management rights provisions cannot and do not provide for unilateral action by the Company.[7]

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[7] The Board said regarding the breach of contract dispute: "Contrary to the Respondent's contention, I find that the Union by agreeing to the management rights clause in the contract did not waive its right to bargain with respect to the relocation of unit work. Any waiver of statutory rights by a union must be clear and unequivocal. Such is not the case here, especially in view of Article I, Section 1(b) of the contract" (97a).

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When the contract provides for the conditions which must be met to enable employees to transfer (with full contract rights such as seniority, rates of pay, pensions, etc.) to a new location, the contract settles the matter. Neither party violates his bargaining obligations by standing upon the contract. Bargaining is not required on such issue upon which the parties have agreed. The parties have bargained away or abandoned all positions contrary or inconsistent with their agreement. To hold otherwise is to encourage one party to resort to Board processes to upset terms of a contract which the other party had every reason to believe had been stabilized for the term of the contract.

The *C & C Plywood* Case affirms that the Board does not have jurisdiction to decide breach of contract disputes, and is limited to the adjudication of statutory rights, as do *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1966), and *Dowd Box Co. v. Courtney*, 368 U.S. 502 (1961).

The lower court decision conflicts with *NLRB v. Honolulu Star-Bulletin*, 372 F.2d 691 (C.A. 9th Cir. 1967) and *Sinclair Refining Company v. NLRB*, 306 F.2d 569 (1962), in which the Fifth Circuit held that where unfair labor practice, if one exists, is solely and wholly dependent upon a contract interpretation, and the provision of the contract to be interpreted is not per se contrary to public policy as shown by the Act, there are not duplicate remedies; the Board is without jurisdiction.[8]

Contract rights are the substance of the dispute in this case, and the only issues were the interpretation and

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[8] In *NLRB v. Hyde*, 339 F.2d 568, 572 (1964), the Ninth Circuit Circuit said "In general, the Board has no power to adjudicate contractual disputes". The Fifth Circuit in *United Steelworkers v. American International Aluminum Corp.*, 334 F.2d 147, 152 (1964), said: "Indeed, so severely is the Board limited to the adjudication of statutory rights that it has no power to adjudicate contractual disputes."

effect of contract provisions. The construction of the contract was not incidental. To the extent that the Board and the lower court in effect construed the contract, the decisions are erroneous.

As pointed out in *Amalgamated Clothing Workers of America v. NLRB*, 343 F.2d 329 (C.A. Dist. of Col. 1965) and *International Union, UMW v. NLRB*, 257 F.2d 211 (C.A. Dist. of Col. 1958), legislative history shows that a breach of contract, even of a term providing for the settlement of grievances by arbitration, is not an unfair labor practice.[9] In the *Amalgamated Case*, the Board concluded that the employer fell into legal error in its effort to put the Union to an election of arbitration under the contract or making an unfair labor practice charge before the Board. Refusal to arbitrate was made the basis of a charge of violation of Section 8(a)(5), and the Board found that the contract violation was not an unfair labor practice. The Court affirmed the Board's findings that refusal to arbitrate is not a refusal to bargain.

[9] At the time the Congress refused to make the violation of a labor agreement an unfair labor practice, the Conference Committee said in its report that "once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of law and not to the National Labor Relations Board." (H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42)

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3. THE DECISION BELOW CONCERNS SIGNIFICANT AND RECURRING PROBLEMS REGARDING THE EXTENT TO WHICH AN EMPLOYER'S RESISTANCE TO ARBITRATION MAY BE THE BASIS FOR AN UNFAIR LABOR PRACTICE.

Grievance procedures with arbitration provisions are very common in labor agreements.

The final position of the Union, expressed in its May 23, 1967, letter (118a) stated the Union's consistent position: that the dispute was a proper grievance and must be handled as such "in the next step of the Grievance Procedure ".[10] The Company's position regarding arbitration was correct, judicially approved by the Sixth Circuit in *Local Union No. 998, etc. v. B. & T. Metals Co.*, 315 F.2d 432 (1963), and *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746 (1963), construing substantially the same grievance procedures as in our case.

In *Timken*, the employer took the same position regarding arbitration that the Union took in our case. The Court found the grievance procedure was limited to an employee who had not been able to adjust a grievance with his superior. Timken was found to have committed an unfair labor practice. Where the position taken by Timken was an unfair labor practice, the same position taken by the Union here results in the Company having been held to have committed an unfair labor practice.

As the Court pointed out in the *Amalgamated* Case, supra, the availability of expanded judicial remedies, such as specific performance of agreements to arbitrate, calls for a high degree of circumspection on the part of the

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[10] The Union officer responsible for the Weltronic contract testified that the Union's position throughout the controversy was always that the matter should be submitted to grievance procedure and arbitration (16a-17a).

Board in treating claims of contract violation. In our case, the Union could have attempted to substantiate its breach of contract claims and force the Company to arbitrate by court action. The law does not give the Union the alternative of taking the matter before the Board under the guise of a refusal to bargain. Similar action ought not to be encouraged.

CONCLUSION

Bargaining is not required by the Act.

The lower court decision will not effect the statutory policy of encouraging, and requiring, the reaching of written agreements between unions and employers. Parties to labor agreements will be encouraged to contend for unreasonable interpretations thereof, to abandon efforts to dispose of disputes under contracts through good faith negotiations, to circumvent judicial processes established by the Congress, to avoid and upset settlement procedures mutually agreed upon, and to remit the interpretation and administration of their contracts to the Board.

If the law penalizes a party for standing upon a contract not violating any law there may be compulsion to bargain, but the virtue of agreement vanishes. Of what value are promises, the performance of which may be insisted upon only at the risk of condemnation for unfair labor practices? We do not believe the law requires such result, and ask that the writ of certiorari be granted.

Respectfully submitted,

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April 6, 1970

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

No. 19,191
Weltronic Company,
Petitioner,
v.
National Labor Relations Board,
Respondent,
and
Local 155, International Union United Automobile, Aerospace & Agricultural Implement Workers of America — UAW,
Intervenor.

No. 19,446
Local 155, International Union United Automobile, Aerospace & Agricultural Implement Workers of America — UAW,
Petitioner,
v.
National Labor Relations Board,
Respondent.

Decided December 16, 1969

(Filed Dec. 16, 1969)

On Petitions for Review and Cross-Petition for Enforcement of an Order of the National Relations Board.

Before: Phillips, Chief Judge; Combs, Circuit Judge; and Taylor, District Judge.*

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* Honorable Robert L. Taylor, Chief Judge, United States District Court for the Eastern District of Tennessee, sitting by designation.

OPINION

Combs, Circuit Judge. The Weltronic Company has petitioned this Court to review an order of the National Labor Relations Board holding that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. §158 (a). The Board requests enforcement of its order. 173 NLRB No. 40. Local 155—UAW has intervened in this action [No. 19,191]. The union has also filed a separate petition to review that portion of the Board's order which failed to grant relief sought by the union [No. 19,446].

The company is engaged primarily in the manufacture and sale of resistance welding controls. Since about 1960, it has developed a line of "plant central" equipment which is used to monitor and control manufacturing operations. The company, or its subsidiaries, has manufactured the plant central equipment at six different locations in Michigan and Canada. From 1965 until 1967, some of this work was performed at the company's Eight Mile Road plant in Southfield, Michigan. Employees at the Eight Mile plant were represented by Local 155—UAW and were protected by a collective bargaining agreement executed between the union and the company in 1964. The union did not represent Weltronic employees at any of its other plants. The company, in April, 1967, moved its plant central wiring and electronic assembly work out of the Eight Mile plant to its new Telegraph Road plant some three miles away. The move was accomplished without written notice to the union and no employees were transferred from the Eight Mile plant to the Telegraph plant. No employee was laid off as a result of the move but some fourteen employees at the Eight Mile plant were already on lay-off status when the move took place.

The collective bargaining agreement between the company and the union contained these relevant provisions:

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ARTICLE I

Recognition

• • •

Section 1. (b) In the event the Company discontinues its operations at the present site and moves to another location in the Detroit Metropolitan Area, seniority employees who can and are willing to accept work at the new location will be transferred to such new location with all their seniority prevailing rates of pay and the prevailing contract with the AFL-CIO-UAW and Local 155.

• • •

Section 4. The Union agrees that the Management of the Company has the right to manage the affairs of the business, to control its properties, and equipment, and to direct the working forces of the Company in accordance with and subject to the terms of this Agreement. Said functions of Management include the right to hire, discharge or discipline for just cause, to establish new jobs and discontinue jobs, maintain discipline and efficiency of employees, to determine the type of products to be manufactured, the location of plants, plan scheduling of production, methods, processes, and means of manufacturing.

• • •

ARTICLE IV

Seniority

• • •

Section 11. When new jobs are created or vacancies occur, the oldest employees in point of service shall be given preference in filling such new job or vacancy so far as consistent with the ability of the employee to perform the services required. All new jobs will be posted forty-eight (48) hours before such vacancy shall be filled.

The Board held that the company violated Section 8(a) (5) and (1) of the Act by transferring unit work from its Eight Mile plant to its Telegraph plant without first notifying the union and giving it an opportunity to bargain; also that the company violated the same two sections by treating the plant central work as not being covered by the bargaining agreement, by unilaterally changing the conditions and terms of employment, and by refusing to negotiate with the union in regard to transferring employees from the Eight Mile plant to the Telegraph plant.

The Board's order requires the company to bargain with the union concerning the transfer of the plant central work, to make whole any employees who have suffered loss, and to post appropriate notices. The Board's order gives the company the option of moving the plant central work back to the Eight Mile plant or retaining it at the Telegraph plant so long as it otherwise complies with the good faith bargaining contemplated by the remedial order.

The company contends that the removal of the plant central work was a managerial prerogative about which it was

under no duty to bargain either under the Act or by the terms of the collective bargaining agreement. It contends alternatively that it did attempt to bargain with the union even though it had no legal duty to do so, and that the Board's finding to the contrary is not supported by the evidence.

We agree with the Board that the company had the statutory duty to give the union the opportunity to bargain about the removal of the plant central work under the circumstances here shown. The preservation of unit work has a significant impact on wages, hours, and "other terms of employment" referred to in Section 8(a) (5) of the Act. *National Woodwork Manufacturers Ass'n v. NLRB,* 386 U.S. 612, 640-642 (1967); *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 209 (1964). We also agree that the bargaining agreement cannot properly be construed as a relinquishment of those rights. While the Board is not empowered to adjudicate the rights of parties covered under a collective bargaining agreement, it does have the right to determine by reference to the agreement whether one of the parties has agreed to relinquish a statutory safeguard. *NLRB v. C & C Plywood Corp.,* 385 U.S. 421 (1967). That is all the Board did here.

The duty to bargain came into play prior to removal of the work. *East Bay Union of Machinists, Local 1304 v. NLRB,* 322 F.2d 411, 415 (D.C. Cir. 1963), *aff'd sub nom., Fibreboard Paper Products Corp. v. NLRB, supra.* The Board's conclusion that the company refused to bargain is supported by substantial evidence, especially in view of the company's admission that no written notice was given of the company's intention to transfer the work. The failure to give notice was consistent with the company's position that removal of the plant central work was a management decision about which it was not required to bargain.

The company also contends that there is no evidence that removal of plant central work adversely affected employees at the Eight Mile plant. This is a question to be determined by the Board under the compliance section of the Act.

The union insists that the Board's order is not adequate in that it does not require return of the plant central work to the Eight Mile plant. Since the order does not appear to be either arbitrary or clearly inadequate, we see no reason to depart from the general rule of allowing the Board wide latitute in shaping remedies.

The union contends that the Board should have sustained its motion to reconsider the Board's order or, in the alternative, to reopen the proceeding for the taking of additional evidence. This argument is premised on the fact that shortly before the Board issued its decision and order the union charged that the company had again, without notice, moved its wiring and electric assembly work on plant central equipment, this time to a plant located in Clare, Michigan, some 130 miles from the Eight Mile plant. The union also filed with the Regional Director a supplemental charge of unfair labor practice based on the second move.

The motion to reconsider or reopen was denied by the Board without reasons being given. The union was advised by letter from the Regional Director that the processing of the supplemental charge would be held in abeyance pending this Court's action on the company's petition for review which had been filed a few days previously. We agree with the union that, under the Administrative Procedure Act, 5 U.S.C. §661 et seq., the Board should have stated its reasons for denying the motion to reconsider or reopen. In view of the Board's silence on the subject, we

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will indulge the presumption that the motion was denied because the company had already filed in this Court its petition for review of the Board's order. We regard this as a valid reason for the Board's action and, since the supplemental charge filed by the union is still on file with the Regional Director awaiting this Court's action in the instant appeal, the rights of the union have not been prejudiced.

The Board's order will be enforced.

APPENDIX B

United States of America

Before The

NATIONAL LABOR RELATIONS BOARD

Case 7-CA-6107

Weltronic Company
and
Local No. 155, International Union United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)

DECISION AND ORDER

On April 3, 1968, Trial Examiner John H. Eadie issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action,

as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision, and a supporting brief. An answering brief was filed by the Charging Party in response to these exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the modifications indicated herein.[1]

---

[1] Like the Trial Examiner, we believe that a return to the *status quo*, so far as is practicable, is an essential part of the remedial order in this case. In adopting the Trial Examiner's Recommended Order, we construe the requirement that the collective-bargaining agreement be applied retroactively to the plant central work as an effort to restore conditions as they would have been had Respondent not moved the work without bargaining; whether the collective-bargaining agreement continues to be applied to the plant central work will depend, in all likelihood, on the outcome of the bargaining which we order, i.e. the disposition of the work and the workforce in question. As part of the return to the *status quo*, we shall specifically provide that, pending the outcome of the bargaining, the Employer give to employees at Eight Mile who had previously performed the plant central work the opportunity to continue to perform it.

We have decided to make one additional modification in the Trial Examiner's Recommended Order. Although, as the Trial Examiner found, it is clear that Respondent failed to satisfy its statutory obligation to bargain with the Union about the move of the plant central

(Continued on next page)

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ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and hereby orders that Respondent, Weltronic Company, Southfield, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

1. Delete paragraph (2b) of the Trial Examiner's Recommended Order and substitute therefor the following:

> (b) Give employees who previously performed plant central work at the Eight Mile Plant an opportunity to continue to perform such work, pending bargaining.

2. Delete the sixth indented paragraph of the Appendix entitled "Notice to All Employees," and substitute the following:

> WE SHALL give employees who previously performed plant central work at the Eight Mile Plant an

---

(Continued from preceding page)

work, and its effect on employees, the record reveals that space is cramped at the old Eight Mile Plant, and, at least in part, Respondent was motivated by economic considerations in making the move. In view of the fact that the work was moved only 3 miles away, we do not believe that physical return of the plant central work to Eight Mile in advance of the good-faith bargaining here directed is essential. See *Unit Drop Forge Division Eaton Yale & Towne, Inc.*, 171 NLRB No. 73. Accordingly, we give Respondent the option of not moving the physical performance of the work back to Eight Mile while it bargains, so long as it complies with all other aspects of the remedial order.

opportunity to continue to perform such work pending bargaining.

Dated, Washington, D.C. October 21, 1968

/s/ Frank W. McCulloch,
Chairman

/s/ John H. Fanning
Member

/s/ Sam Zagoria
Member

National Labor Relations Board

(Seal)

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TRIAL EXAMINER'S DECISION

United States of America

Before The
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS

Washington, D. C.

Case No. 7-CA-6107

Weltronic Company
and
Local No. 155, International Union, United Automobile, Aerospace and Agricultural Workers of America (UAW), AFL-CIO

Stanley H. Slazinski, Esq., and
Thomas R. Wilks, Esq.,
for the General Counsel.
Bruce D. Carey, Esq., and
Frederick A. Carey, Esq.,
for the Respondent.

TRIAL EXAMINER'S DECISION

Statement of the Case

John H. Eadie, Trial Examiner: This proceeding was held before me in Detroit, Michigan, on December 11, 1967, on the complaint of the General Counsel and the answer of Weltronic Company, herein called the Respondent.[1] The

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[1] The charge was filed on May 29, 1967. The complaint issued on October 12, 1967.

issue litigated was whether the Respondent violated Section 8(a)(1) and (5) of the Act. After the conclusion of the hearing the General Counsel and the Respondent filed briefs with the Trial Examiner.

Upon the entire record in the case, and from my observation of the witness, I make the following:

Findings of Fact

I. The Business of the Respondent

The Respondent, a Michigan corporation, has its principal office and place of business at 19500 West Eight Mile Road in the City of Southfield, Michigan, herein called the Eight Mile Plant. Since on or about April 1, 1967, the Respondent has maintained and operated a second plant at 20905 Telegraph Road, Southfield, Michigan, designated as its Plant Central Division and herein called the Telegraph Plant. The Respondent is engaged in the manufacture, sale and distribution of resistance welding controls, plant central equipment and related products.

During the year ending December 31, 1966, the Respondent manufactured, sold and distributed at its Eight Mile Plant products valued in excess of $500,000, of which products valued in excess of $200,000, were shipped from said plant directly to points located outside of the State of Michigan.

The complaint alleges, the Respondent answer admits, and the Trial Examiner finds that the Respondent is engaged in commerce within the meaning of the Act.

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II. The Labor Organization Involved

Local No. 155, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, herein called the Union, is a labor organization which admits to membership employees of the Respondent.

III. The Unfair Labor Practices

The Respondent and the Union have been parties to a collective bargaining agreement since 1947. The relevant portions of the contract dated September 1, 1964, are as follows:

Article I

Recognition

Section 1. (a) The Company agrees to bargain with the Union as the exclusive bargaining agency for its employees at its plant located at 19500 West Eight Mile Road, Southfield, Michigan with the exception of office employees, watchmen, foremen, confidential employees and experimental engineers.

(b) In the event the Company discontinues its operations at the present site and moves to another location in the Detroit Metropolitan Area, seniority employees who can and are willing to accept work at the new location will be transferred to such a new location with all their seniority prevailing rates of pay and the prevailing contract with the AFL-CIO-UAW and Local 155.

Section 2. The Company will negotiate at all times necessary in the manner provided herein, with the

chosen accredited representative of its employees for the purpose of determining any disputes which may arise as to wages, rates, working conditions, discriminations or dismissals, and will adjust any grievances which may now exist or may arise in the future.

• • •

Section 4. The Union agrees that the Management of the Company has the right to manage the affairs of the business, to control its properties, and equipment, and to direct the working forces of the Company in accordance with and subject to the terms of this Agreement. Said functions of Management include the right to hire, discharge or discipline for just cause, to establish new jobs and discontinue jobs, maintain discipline and efficiency of employees, to determine the type of products to be manufactured, the location of plants, plan scheduling of production, methods, processes, and means of manufacturing.

ARTIVLE IV

Seniority

Section 9. In the event of a reduction in the work force, the following procedure shall be observed:

First: Probationary employees shall be laid off and no overtime shall be worked as long as employees with seniority are laid off, except in case of emergency by mutual agreement.

Second: Seniority employees will be laid off in accordance with their seniority standing, provided the senior employees are capable of meeting the normal standard of efficiency for the job they claim within a period not to exceed three (3) working days.

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Third: When a further decrease of employees is necessary, no layoff shall occur if it is possible for all regular employees to work thirty-two (32) hours per week. The thirty-two (32) hour week shall not continue after four (4) weeks in any calendar year unless agreed to by the Company and the Shop Committee. When an increase in force is necessary, the above procedure shall be reversed.

* * *

Section 11. When new jobs are created or vacancies occur, the oldest employees in point of service shall be given preference in filling such new job or vacancy so far as consistent with the ability of the employee to perform the services required. All new jobs will be posted forty-eight (48) hours before such vacancy shall be filled.

Since about 1960 the Respondent developed and manufactured plant central equipment. Prior to April 1, 1967, such equipment was manufactured in six plants owned or leased by the Respondent or its subsidiary or affiliated companies at Southfield (Eight Mile), Oak Park, Detroit, Bay City and Clare, Michigan, and at Windsor, Ontario, Canada.

Since about May, 1965, some plant central work was carried on at the Eight Mile Plant. This consisted of welding and assembly of cabinets, spray painting, and wiring and electronic assembly work. The wiring and electronic assembly work was performed for the most part by employees Pluma French and Helen Labine. Other employees at times also performed this work.

On or about April 1, 1967, without any prior notice to the Union, the Respondent moved the plant central wir-

ing and electronic assembly work from the Eight Mile Plant to its new Telegraph Plant, located approximately 3 miles from the Eight Mile Plant.[2] French continued on central equipment work for about 2 weeks after the move, finishing up work which had been assigned to her. She asked Robert Chinavare,[3] her supervisor, and William Wood, general manager of the Respondent's plant central division, to be transferred to the Telegraph Plant. They refused her request, telling her that she was "in a union shop" and that they did not know what they were "going to do." When she offered to call the Union to find out if she could be transferred, they again refused her request.[4]

The move of the plant central work from the Eight Mile Plant to the Telegraph Plant did not result in the layoff of any employees. However during September and October of 1966, 14 employees had been laid off at the Eight Mile Plant. The Respondent did not transfer any production employees from the Eight Mile Plant to the Telegraph Plant and did not recall any of the employees who had been laid off for work at the Telegraph Plant. The Respondent hired five new employees prior to the hearing herein for the Telegraph Plant at rates considerably less than those specified in its contract with the Union.

On April 14, 1967, the Union, under the terms of its contract with the Respondent, filed a grievance as follows:

---

[2] It appears that at or about this same time the Respondent moved work to the Telegraph Plant from the other five plants where components of plant central equipment previously had been manufactured.

[3] Chinavare testified that he is "plant manager of plant central division of Weltronic."

[4] French testified credibly to the above. Neither Chinavare nor Wood denied that French asked to be transferred. Chinavare denied that he mentioned the Union when French asked to be transferred. Wood testified that he had no recollection of a conversation with French on the subject.

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> The employees of Weltronic Co. 19500 W. Eight Mile road feel that said Company made a definite breach of contract by taking away from its employees the Plant Central job. This job originated at Weltronic Co. 19500 W. 8 mile rd. and here it should stay. We feel that the Plant Central job would not only give our people who are now working steadier employment, but it would also enable the employees who are laid off to come back to work.

The parties met to discuss the grievance on or about April 23. The Union was represented by Marie Skierski, recording secretary of the Union, and by its shop committee. John Anderson, in charge of the Respondent's public relations, stated that it was not possible to transfer employees or recall the laid off employees for work at the Telegraph Plant because the Respondent was paying wages at the Eight Mile Plant which it considered to be excessive for competitive reasons. He also stated that the space available at the Eight Mile Plant for work on plant central equipment was not sufficient. When the parties were unable to resolve the grievance, Skierski requested arbitration. The Respondent at first agreed to but later refused arbitration. At Skierski's request, the Respondent's position was put in writing by letter to Skierski, dated April 26, 1967, as follows:

> You have requested that we negotiate and arbitrate the question of whether we have the right to establish a Plant Central Division at 20905 Telegraph Road, Southfield, Michigan, without transferring the employees who worked on Plant Central at 19500 West Eight Mile Road, Southfield, Michigan to a new location.

> Our contract does not provide for negotiation or arbitration of any management rights matters and it does provide that we retain all management rights, including the determination of the location of plants. The contract does not provide for transferring any employees to a new location unless we discontinue operations at 19500 West Eight Mile Road, Southfield, Michigan.
>
> For the above reasons, we decline to negotiate or arbitrate the question referred to in paragraph one hereof.

The Union filed another grievance dated May 5, 1967, as follows:

> The Company has violated Article I, Section 1. b. of present agreement by refusing to transfer the seniority employees with this work. Article I, Section 2 by refusing to negotiate the moving of this work. They have also violated Section 4 by refusing to recall the laid off Seniority Employees.

The Respondent refused to meet on this grievance or to discuss the matter further.

Contrary to the Respondent's contention, I find that the Union by agreeing to the management rights clause in the contract did not waive its right to bargain with respect to the relocation of unit work. Any waiver of statutory rights by a union must be clear and unequivocal. Such is not the case here, especially in view of Article I, Section 1(b) of the contract.

Further, the Respondent contends that lack of space at the Eight Mile Plant and the ecomonic necessity of getting all plant central work, excepting cabinet work, under one

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roof prompted the moving of such work to its new plant. The evidence indicates that the Respondent was motivated by additional considerations. The testimony of French and Skierski shows that the reason the Respondent refused to transfer unit employees to the Telegraph Plant was in order to hire nonunion employees at rates far less than those called for in the contract. However, assuming *arguendo* that the Respondent was motivated by economic reasons alone, it still was obligated to negotiate with the Union concerning the transfer of unit work.

Accordingly, I find that the Respondent by transferring unit work from its Eight Mile Plant to its Telegraph Plant, without first notifying the Union of its intention to do so or gving it an opportunity to bargain thereon, violated Section 8(a)(5) and (1) of the Act. It is also found that the Respondent engaged in additional violations of Section 8(a)(5) of the Act by treating the plant central work as no longer being covered by the contract, by unilaterally changing the terms and conditions of employment, by paying employees at rates less than those provided for in its contract with the Union, and by refusing to negotiate with the Union the transfer of unit employees to or the recalling of laid off employees for work at the Telegraph Plant.

IV. The Effect of the Unfair Labor Practices upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate and substantial relationship to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, it will be recommended that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

It would be futile to attempt to remedy the violation if the Respondent's transfer of unit work to its Telegraph Plant was permitted to stand. No genuine bargaining over a decision to transfer work could be conducted where that decision has already been made and implemented. Therefore, it will be recommended that the Respondent be ordered to restore the *status quo ante* by returning the plant central work previously performed by its employees at its Eight Mile Plant and fulfilling its statutory obligation to bargain.

Further, it appears that the Respondent's unlawful action caused the loss of employment to at least some of its laid off employees. Under the circumstances, it will be recommended that the Respondent be ordered to apply the terms of its collective-bargaining agreement with the Union to the plant central work retroactively to the date of the transfer of such work to the Telegraph Plant, and to recall laid off employees who were affected by the Respondent's unilateral action, pursuant to the seniority and recall provisions of said contract, making them whole for any loss of earnings suffered as a result of the Respondent's unlawful conduct. Backpay shall be based upon the earnings which they normally would have received from the date that the unit work was transferred to the Telegraph Plant to the date of the Respondent's offer of reinstatement, less any net interim earnings, and shall be computed on a quarterly basis in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289, together with interest on such sums, such interest to be computed in accordance with the formula prescribed by the Board in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

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Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.

2. All employees at the Respondent's plant located at 19500 West Eight Mile Road, Southfield, Michigan, with the exception of office employees, watchmen, foremen, confidential employees and experimental engineers, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

3. The Union has been at all times material herein the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

4. The Respondent has engaged in conduct violative of Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case, I recommend that the Respondent, its officers, agents, successors and assigns, shall be ordered to:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union as the exclusive bargaining representative of the Respondent's

employees in the appropriate unit with respect to wages, hours, and other terms and conditions of employment; unilaterally transferring unit work to other locations or otherwise changing the wages, hours, and other terms and conditions of employment of unit employees without prior bargaining with the Union or any other union they may select as their representative; unilaterally treating the plant central work as no longer being covered by its collective-bargaining agreement with the Union; and refusing to negotiate with the Union the transfer of unit employees to or the recalling of laid off employees for work at the Telegraph Plant.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Bargain collectively with the Union as the exclusive bargaining representative of the Respondent's employees in the appropriate unit with respect to wages, hours, and other terms and conditions of employment.

(b) Return the plant central work which was previously performed by unit employees to its Eight Mile Plant.

(c) Apply the terms of the collective-bargaining agreement to the plant central work retroactively to the date of the transfer of such work, including recall of laid off employees pursuant to the seniority and recall provisions of said contract, as well as payment of backpay to the employees affected in the manner set forth in the section above entitled "The Remedy."

(d) Preserve and, upon request, make available to the National Labor Relations Board or its agents, for examination and copying all records necessary for the determination of the amount of backpay due under these recommendations.

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(e) Post at its store in Southfield, Michigan copies of the notice attached hereto and marked Appendix.[5] Copies of said notice on forms provided by the Regional Director for the Seventh Region shall, after being duly signed by the Respondent or its authorized representatives, be posted by Respondent immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for the Seventh Region in writing within 20 days from the date of the receipt of this Decision what steps it has taken to comply herewith.[6]

Dated at Washington, D.C.

/s/ John H. Eadie
Trial Examiner

(The notices required to be posted are reproduced at pages 104a-105a of the Joint Appendix.)

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[5] In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[6] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX C

STATUTORY PROVISIONS

United States Code, Title 29

Section 158—unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title:

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.

(61 Stat. 140-141)

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, ...

(61 Stat. 142)

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IN THE

Supreme Court of the United States

No. 1422

OCTOBER TERM, 1969

WELTRONIC CO.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
and
Local 155, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR LOCAL 155, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. A19-25) is reported at 419 F.2d 1120. The Board's Decision and Order (Pet. B25-42) is reported at 173 NLRB #40.

JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1969. Rehearing was denied on January 22, 1970, and mandate was stayed pending the filing of the petitioner's petition. The petition for a writ of certiorari was filed on or about April 6, 1970. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the employer is under an obligation to bargain with the certified bargaining representative about a prospective decision to move bargaining unit work to another of its facilities absent contractual language which "clearly and unmistakably" waives the bargaining representative's right to such bargaining?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151, *et seq.*), are as follows:

> "§7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right

may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"§8.(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

STATEMENT

A. The Board's Findings of Fact

Since 1960 the Company has manufactured and sold plant central equipment, a complex system utilized to monitor and control manufacturing operations (A. 88a, 92a; 122a-124a).[1] In May, 1965 certain employees at Weltronic's Eight Mile plant began performing work on the plant central equipment. This work consisted of welding and assembly of cabinets, spray painting, and wiring and electronic assembly work (A. 92a; 20a-22a, 33a-35a, 43a-44a, 47a, 50a).

The collective bargaining agreement entered into between the Company and the Union on September 1, 1964 covers the relevant time period involved herein and contains the following relevant provisions:

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[1] "A" references are to the Record Appendix filed in the Court of Appeals. References preceding a semi-colon are to the Board's findings; those following are to the supporting evidence.

"Article I

"Recognition

"Section 1. . . .

* * * * *

"(b) In the event the Company discontinues its operations at the present site and moves to another location in the Detroit Metropolitan Area, seniority employees who can and are willing to accept work at the new location will be transferred to such a new location with all their seniority, prevailing rates of pay and the prevailing contract with the AFL-CIO-UAW and Local 155.

"Section 2. The Company will negotiate at all times necessary in the manner provided herein, with the chosen accredited representatives of its employees for the purpose of determining any disputes which may arise as to wages, rates, working conditions, discriminations or dismissals, and will adjust any grievances which may now exist or may arise in the future.

* * * * *

"Section 4. The Union agrees that Management of the Company has the right to manage the affairs of the business, to control its properties, and equipment, and to direct the working forces of the Company in accordance with and subject to the terms of this Agreement. Said functions of Management include the right to hire, discharge or discipline for just cause, to establish new jobs and discontinue jobs, maintain discipline and efficiency of employees, to determine the type of products to be manufactured, the location of plants, plan scheduling of production, methods, processes, and means of manufacturing."

"Article IV

"Seniority

"Section 9. In the event of a reduction in the work force, the following procedure shall be observed:

"First: Probationary employees shall be laid off and no overtime will be worked as long as employees with seniority are laid off, except in case of emergency by mutual agreement.

"Second: Seniority employees will be laid off in accordance with their seniority standing, provided the senior employees are capable of meeting the normal standard of efficiency for the job they claim within a period not to exceed three working days.

"Third: When a further decrease of employees is necessary, no layoff shall occur if it is possible for all regular employees to work thirty-two (32) hours per week. The thirty-two (32) hour week shall not continue after four (4) weeks in any calendar year unless agreed to by the Company and the Shop Committee. When an increase in force is necessary, the above procedure shall be reversed.

* * * * *

"Section 11. When new jobs are created or vacancies occur, the oldest employees in point of service shall be given preference in filling such new job or vacancy so far as consistent with the ability of the new employee to perform the services required. All new jobs will be posted forty-eight (48) hours before such vacancy shall be filled" (A. 110a-113a).

On April 1, 1967 the Company moved the plant central wiring and electronic assembly work to its new Telegraph plant, located about three miles from the Eight Mile plant (A. 89a, n 1, 94a-95a; 41a-42a, 47a-48a). One of the reasons for the transfer of the work out of the Eight Mile

plant was to avoid paying the contract wages in effect at the time and instead to pay non-union employees lower wages (A. 95a, 98a; 14a-15a, 27a-28a). A partial reason was the crammed space at the Eight Mile plant (A. 89a, n 1). The Union was neither notified of the pending move nor given any opportunity to bargain about it (A. 89a, n 1, 95a; 13a, 20a, 33a, 41a-42a, 45a).[2]

The movement of the work out of the Eight Mile plant had an immediate and telling effect on the bargaining unit and the employees of the Company. Employees French and Labine who had spent virtually all of their time performing plant central work suddenly found that their jobs were gone. They were subsequently assigned to other tasks which had previously been performed by other bargaining unit employees. Other employees whose duties had consisted partially of plant central work suddenly found that that portion of their work duties had disappeared. Some of these employees were subsequently laid off. No employees were transferred to the Telegraph plant nor were any of the laid off employees called back to work at either plant, although one employee requested such a transfer (A. 95a) and at least five new employees were hired at the Telegraph plant to perform the tasks formerly performed by the bargaining unit employees refered to above (A. 94a-96a; 4a-5a, 21a-23a, 33a-35a, 77a-80a, 120a-121a). The wages paid the new hires at the Telegraph plant were considerably lower than those paid the employees at the Eight Mile plant who had performed the same work (A. 96a, 98a; 14a-15a, 27a-28a, 121a).

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[2] The Company, in its petition (p. 5) insists that notice was given. However, the Board and Court of Appeals found otherwise, as noted above. Such finding is binding here.

As noted above, the Union was never given notice of the pending move. It learned of the action only after the work was moved out of the Eight Mile plant. Acting to protect its options so that it could pursue whatever remedies were available to it, the Union filed a grievance alleging a breach of contract and insisted on bargaining over the work transfer. The Company, however, taking the position that it had a right to do as it did, denied the grievance *and* refused to bargain with the Union concerning the work transfer.[3] Later, realizing that the contract did not cover this transfer of unit work from the bargaining unit to another plant, and realizing further that Weltronic had absolutely no intention of bargaining ove the transfer, the Union abandoned the grievance and filed the Charge herein (A. 95a-97a; 14a-17a, 114a-119a).[4]

B. The Decisions of the Board and the Court of Appeals

Upon the foregoing facts, the Board found that the employer had not complied with its duty to bargain with the Union concerning the movement of certain operations from the bargaining unit to another plant. The Board found that the company's reasons for making the move were partially economic (cramped space) and partially bad faith (desire to avoid paying contract rates to Union members).

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[3] The petitioner's assertion (Pet. 7) that it first learned of the Union's desire to negotiate when it received the Charge in this matter is belied by its own letter of April 26, 1967 wherein it stated that it would not "negotiate or arbitrate" this matter (A. 97a; 115a). In any event the Board found that the Union requested negotiations which request was denied. That fact is binding here.

[4] After filing the Charge, the Union made one further attempt to discuss this matter with the Company (A. 118a). However, the Company responded by curtly stating that it "[saw] no reason for further correspondence in the matter" because it would not bargain about the work transfer (A. 119a).

Substantially adopting the recommendations of the Trial Examiner the Board ordered the company to bargain with the Union concerning the move, to make the work available to bargaining unit employees at its then new location,[5] and to make whole any employees who suffered customary notices.

The Court of Appeals sustained the Board's findings and enforced its order in full (Pet. App. 19-25). In doing so, the Court reasoned that the employer was under a "statutory duty to give the union the opportunity to bargain" about the work removal "prior to removal of the work" (Pet. App. 23). The Court rejected the employer's argument that the work movement was a "management prerogative about which it was under no duty to bargain" under the Act (Pet. App. 22-23).

ARGUMENT

The basic question raised in the petition is whether the Court below erred in affirming the Board's decision that petitioner was under an obligation to notify and bargain with the Union about its desire to move the plant central work out of the bargaining unit prior to making its decision. This presents an issue which this Court has already answered and, therefore, it does not warrant review. In *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, this Court held that an employer must bargain with a union about its decision to sub-contract out bargaining unit work prior to actually making and effectuating the decision. In

[5] The work has been moved again, rendering this aspect of the Order of dubious value. This aspect of the case is before the Board in supplemental proceedings now under way.

NLRB v. C & C Plywood Corp., 385 U.S. 421 this Court held that an employer must bargain about proposed changes in the wage structure prior to instituting them despite contract language similar to that involved here. The Court held that the Board had the power to interpret the contractual provisions there and to hold that its waiver language was not specific enough to constitute a waiver of bargaining over the subject matter in question. The Court below specifically followed *Fibreboard* and *C & C Plywood* in holding that the Board properly exercised its power in determining that the Union here had not contractually waived its right to bargain about the work move and, therefore, the employer violated the Act by acting as it did prior to giving the Union an opportunity to bargain. See *East Bay Union of Machinists, Local 1304 v. NLRB*, 322 F.2d 411, 415 (D.C. Cir., 1963), aff'd *sub nom., Fibreboard Paper Prod. v. NLRB, supra.*[8]

[8] Nor is there substance to petitioner's further contention that "[b]argaining is not required by the Act" (Pet. 18). Sections 8(a)(5) and 8(d) of the Act adequately answer it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: April 23, 1970

BLEED THROUGH POOR COPY

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1422

WELTRONIC COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND LOCAL 155, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA—UAW

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 19–25) is reported at 419 F. 2d 1120. The Board's decision and order (Pet. 25–41) are reported at 173 NLRB No. 40.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1969, and a petition for rehearing *en banc* was denied on January 22, 1970 (Pet. 2). The petition for a writ of certiorari was filed on April 14,

384-335—70

1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board properly concluded that the employer violated its duty to bargain under the National Labor Relations Act when it transferred work from an old facility to a new plant three miles away without first bargaining about that decision with the union representing the employees who formerly performed the work at the old plant.

2. Whether the Board, in determining the unfair labor practice charge, had jurisdiction to interpret provisions of the collective bargaining agreement relied upon by the employer as a defense to the charge.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), are set forth at page 42 of the petition.

STATEMENT

Weltronic Company, the petitioner, manufacturers, sells and distributes resistance welding controls and, since about 1960, has also produced and sold "plant central" equipment, used to monitor and control plant operations (J.A. 92, 94; 49, 50, 52, 85–86).[1] From May 1965 until April 1967, the Company manufactured some plant central equipment together with resistance

[1] "J.A." references are to the Joint Appendix filed in the court below.

welding controls at its Eight Mile Plant in Southfield, Michigan (J.A. 94; 50). While two employees performed most of the wiring and electronic assembly work on the plant central equipment, all of the Eight Mill Plant employees were assigned to various plant central jobs at one time or another. (J.A. 95; 7–8, 20–21, 26–27, 33–35, 36–37).

The employees at the Eight Mile Plant had been represented by the respondent Union since 1947 and were, during the events herein described, covered by a duly negotiated collective bargaining agreement (J.A. 92–93; 4, 6–7, 110–113). On April 1, 1967, without any notice to the Union, the Company moved the bulk of its plant central wiring and electronic assembly work out of the Eight Mile Plant to its new Telegraph Plant, three miles away (J.A. 95; 10, 13, 20, 27, 29, 33, 41–42, 47–48, 59, 60–61, 82–83). No employee was transfered from the Eight Mile Plant to the Telegraph Plant (J.A. 95; 61).

Although there were no discharges or layoffs as a result of the move, 14 employees at the Eight Mile Plant were already on layoff status when the move took place. The Company did not recall any of these individuals to work at the Telegraph Plant, even though at least some were capable of doing plant central work (J.A. 95; 39–41, 120). The Company subsequently hired 5 new, non-union employees for the Telegraph Plant at much lower rates than those specified in the contract with the Union (J.A. 96; 120, 121).

On April 14, the Union shop steward at the Eight Mile Plant filed a grievance protesting the transfer of the plant central equipment work (J.A. 96; 12–13,

42–43, 114). Representatives of the Union and the Company met to discuss the grievance, but could not resolve it and the Union requested arbitration (J.A. 96; 13–16). The Company initially agreed, but then changed its mind, stating its position in a letter to the Union, dated April 26:

> You have requested that we negotiate and arbitrate the question of whether we have the right to establish a Plant Central Division at 20905 Telegraph Road, Southfield, Michigan, without transferring the employees who worked on Plant Central at 19500 West Eight Mile Road, Southfield, Michigan to a new location.
>
> Our contract does not provide for negotiation or arbitration of any management rights matters and it does provide that we retain all management rights, including the determination of the location of plants.[2] The contract does not provide for transferring any employees to a new location unless we discontinue operations at 19500 West Eight Mile Road, Southfield, Michigan.

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[2] The management rights clause referred to by the Company, contained in Article I, Section 4 of the contract, read as follows (J.A. 110–111):

"The Union agrees that the Management of the Company has the right to manage the affairs of the business, to control its properties, and equipment, and to direct the working forces of the Company in accordance with and subject to the terms of this Agreement. Said functions of Management include the right to hire, discharge or discipline for just cause, to establish new jobs and discontinue jobs, maintain discipline and efficiency of employees, to determine the type of products to be manufactured, the location of plants, plan scheduling of production, methods, processes, and means of manufacturing."

> For the above reasons, we decline to negotiate or arbitrate the question referred to in paragraph one hereof. [J.A. 97; 15, 115.]

The Union filed another grievance dated May 5, which stated that the Company had violated various provisions of the contract "by refusing to negotiate the moving of this work" (J.A. 97; 15, 116).[3] The Company refused to meet on this grievance, stating that relocation was "a matter reserved as a management right," and also denied a subsequent Union request to discuss the problem declaring that it could "see no reason for further correspondence in the matter" (J.A. 97; 15, 117–119). The Union then filed charges with the Board, alleging that the Company had refused to bargain in violation of the National Labor Relations Act.

On the facts set forth above, the Board held that the Company violated Section 8(a)(5) and (1) of the Act by transferring unit work from its Eight Mile Plant to its Telegraph Plant without first notifying the Union and giving it an opportunity to bargain thereon,[4] by treating the plant central work as no longer covered by the contract, by paying employees rates less than those provided for in its contract with the Union, and by refusing to negotiate with the Union about the transfer of unit employees to, or the recalling of laid off employees for work, at, the Tele-

[3] The provisions of the contract referred to by the Union—Article I, Sections 1(b) and 2, and Article IV—are set forth at Pet. 21–22 and J.A. 110.

[4] The Board found that the Union, by agreeing to the management rights clause in the contract, did not waive its right to bargain about the relocation of unit work (Pet. 36).

graph Plant (Pet. 26, 37). The Board ordered the Company to bargain with the Union respecting the transfer of work and, pending the outcome of the bargaining, (1) to give the employees who previously performed plant central work at the Eight Mile Plant an opportunity to continue to perform such work, and (2) to apply the terms of the collective bargaining agreement to the plant central work retroactively to the date of transfer of such work, including the recall and reimbursement for lost earnings of laid off employees who were affected by the Company's unilateral action. The Board's order gives the Company the option of either moving the plant central work back to the Eight Mile Plant or retaining it at the Telegraph Plant, so long as it otherwise complies with the good faith bargaining obligation imposed by the order. (Pet. 26–27, 38–41.)

On the Company's petition for review, the court of appeals enforced the Board's order (Pet. 25), noting that, "[w]hile the Board is not empowered to adjudicate the rights of parties covered under a collective bargaining agreement, it does have the right to determine by reference to the agreement whether one of the parties has agreed to relinquish a statutory safeguard" (Pet. 23).

ARGUMENT

1. In *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203, this Court held that an employer violated his duty to bargain under the National Labor Relations Act when, without first negotiating with the union representative, it contracted out maintenance work previously performed by its employees to an independent contractor. The

court of appeals correctly concluded that the *Fibreboard* decision governed the factual situation here. The Company admittedly transferred the plant central work from the Eight Mile Plant to the Telegraph Plant without first bargaining with the Union either about the transfer decision or its effect upon the unionized employees. The transfer did not alter the Company's basic operation as it continued to manufacture plant central equipment at the new location by employing lower-paid non-union workers. The reason offered by the Company for the transfer—to achieve greater efficiency and economies—raised matters, as the Court noted in *Fibreboard,* "peculiarly suitable for resolution within the collective bargaining framework" (379 U.S. at 214). Finally, the transfer had an impact on the bargaining unit since the company was less likely, following the transfer, to recall any of the 14 employees on layoff status. See *Auto Workers* v. *National Labor Relations Board,* 381 F. 2d 265, 266 (C.A. D.C.), certiorari denied, 389 U.S. 857.

The cases relied on by petitioner are not inconsistent with the decision below. In *Puerto Rico Telephone Co.* v. *National Labor Relations Board,* 359 F. 2d 983 (C.A. 1), the court found that the subcontracting out of work attacked by the union did not adversely affect the bargaining unit, since the number of jobs in the unit had actually increased. The validity of the Second Circuit's pre-*Fibreboard* decision in *National Labor Relations Board* v. *Rapid Bindery, Inc.,* 293 F. 2d 170 (C.A. 2), which involved a plant closing and not a transfer of work as here, has since been questioned by that court. See *Genesco, Inc.* v. *Joint Council 13, United Shoe Workers,* 341 F. 2d 482, 488. Even *Rapid Bindery,* while

finding no bargaining requirement with respect to the decision to close down a plant, imposed a duty to bargain about the effects of that decision on the employees involved. Two other cases cited by the petitioner, *National Labor Relations Board* v. *Spun-Jee Corp.*, 385 F. 2d 379, 383–384 (C.A. 2), and *National Labor Relations Board* v. *Cone Mills Corp.*, 373 F. 2d 595, 600–601 (C.A. 4), merely hold that unions had waived their bargaining rights; there was no such waiver here.

2. Contrary to petitioner's remaining contention, the Board was authorized to interpret the collective bargaining contract to determine whether there was an unfair refusal to bargain. See *National Labor Relations Board* v. *C & C Plywood Corp.*, 385 U.S. 421; *National Labor Relations Board* v. *Joseph T. Strong*, 393 U.S. 357, 360–362.

CONCLUSION

The petition for a writ of certiorari should be denied.

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MAY 1970.

U.S. GOVERNMENT PRINTING OFFICE 1970